Supreme Court, U.S.
FILED
JUL 11 2007
OFFICE OF THE CLERK

No. 06-1481

In The

Supreme Court of the United States

HARRY MCNAMARA, ET AL.,

Petitioner,

v

CITY OF RITTMAN,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

Thomas J. Ward
(Counsel of Record)
Christopher M. Whitcomb
Duane J. Desiderio
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

TABLE OF CONTENTS

Page (s)

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE STATE LITIGATION RULE AND THE *"WILLIAMSON* TRAP" 4

II. BASED ON THE COURT OF APPEALS' INTERPRETATION OF *WILLIAMSON,* UNDER NO SET OF CIRCUMSTANCES COULD PETITIONERS EVER OBTAIN FEDERAL COURT ADJUDICATION OF THEIR 5TH AMENDMENT TAKINGS CLAIM 8

A. Petitioners Could Not Have Immediately Brought Their Takings Claim to Federal Court in 1994 9

B. Seeking a Writ of Mandamus Was Not Reasonable Under Ohio Law in This Case 13

1. *Mandamus Would Not Have Issued* 13

2. *Mandamus Would Have Precluded Petitioners' Subsequent Fifth Amendment Takings Claim* 14

C. Petitioners Reasonably Believed Their Damage Claim Would Ripen Their Federal Takings Claim 16

III. *WILLIAMSON* CONFLICTS WITH THIS COURT'S OTHER OPINIONS 17

A. Discord on Simultaneous vs. Subsequent Takings Claims 17

B. Anomaly with Removal Jurisdiction 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page (s)

Cases

Agripost, Inc. v. Miami-Dade County,
195 F.3d 1225 (11th Cir. 1999),
cert. denied, 531 U.S. 815 (2000) 6

Akron-Seller Co. v. City of Akron, 359 N.E.2d 704
(Ohio App. 1974) 15

Ardire v. Rump, 996 F.2d 1214 (6th Cir. 1993)
(unpublished table decision) 12

Asociación de Subscripción Conjunto del Seguro de Responsabilidad Obligatorio v. Galarza, 484 F.3d 1
(1st Cir. 2007) 5

Bateman v. City of W. Bountiful, 89 F.3d 704
(10th Cir. 1996) 6

City of Chicago v Int'l Coll of Surgeons,
522 U.S. 156 (1997) 18, 19

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687 (1999) 3

Cline v. Am. Aggregates Corp., 474 N.E.2d 324
(Ohio 1984) 14, 17

Cline v. Am. Aggregates Corp., 582 N.E.2d 1
(Ohio App. 1989) 14

County Concrete Corp. v. Town of Roxbury,
442 F.3d 159 (3d Cir. 2006) 6

TABLE OF AUTHORITIES (continued)

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004)..... 7

Dolan v. City of Tigard, 512 U.S. 374 (1994)..... 7

Duncan v. Vill. of Middlefield, 951 F.2d 348 (6th Cir. 1991) (unpublished table decision)..... 11

England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411 (1964)..... 15

Forseth v. Vill. of Sussex, 199 F.3d 363 (7th Cir. 2000)..... 6

Four Seasons Apartment v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985)..... 9

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991)..... 6

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004)..... 5

Harris v. City of Akron, 20 F.3d 1396 (6th Cir. 1994).... 12

Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006)..... 19

Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003)..... 19

Kruse v. Vill. of Chagrin Falls, 74 F.3d 694 (6th Cir. 1996)..... 4

TABLE OF AUTHORITIES (continued)

Maloney v. Sacks, 181 N.E.2d 268 (Ohio 1962) 14

McKenzie v. City of White Hall, 112 F.3d 313 (8th Cir. 1997) 5

McNamara v. City of Rittman, 473 F.3d 633 (6th Cir. 2007) 3, 4, 10

McNamara v. Rittman, No 1:00-CV-3046 (D. Ohio Aug. 8, 2002) 17

Peters v. Fair, 427 F.3d 1035 (6th Cir. 2005) 6

Rockstead v. City of Crystal Lake, 486 F.3d 963 (7th Cir. 2007) 7

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 3

Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991) 6

San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005) ..... *passim*

San Remo Hotel, L.P. v. San Francisco City and County, 364 F.3d 1088 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005) 15

San Remo Hotel, L.P. v. City and County of San Francisco, 41 P.3d 87 (Cal. 2002) 15

Sandy Creek Investors, Ltd. v. City of Jonestown, 325 F.3d 623 (5th Cir. 2003) 19

TABLE OF AUTHORITIES (continued)

Silver v. Franklin Twp. Bd. of Zoning, 966 F.2d 1031 (6th Cir. 1992) 11

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 864 F.2d 1475 (9th Cir. 1989) 5

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998) 6

State ex rel. Brown v. Preston, 198 N.E.2d 90 (Ohio Ct. App. 1963) 10

State ex rel. Levin v. City of Sheffield Lake, 637 N.E.2d 319 (Ohio 1994) 9, 10, 15

State ex rel. McKay v. Kauer, 102 N.E.2d 703 (Ohio 1951) 10

Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) 6

Vill. of Willoughby Hills v. Corrigan, 278 N.E.2d 658 (Ohio 1972) 12

Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373 (8th Cir. 1997) 6

Wilkinson v. Pitkin County Bd. of Comm'rs, 142 F.3d 1319 (10th Cir. 1998) 7

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) ..... *passim*

TABLE OF AUTHORITIES (continued)

Wilson v. City of Cincinnati, 175 N.E.2d 725 (Ohio 1961) 10

Codes & Statutes

28 U.S.C. § 1441 19

Ohio Rev. Code § 163 13

Ohio Rev. Code § 2731 ..... 12, 13, 14

Ohio Rev. Code § 2737 13

Tenn. Code Ann. § 29-16-123 (1980) 16

Other

Michael Berger & Gideon Kanner, *Shell Game! You Can't get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody State*, 36 Urb. Law. 671 (2004) 6-7

Steven J. Eagle, Regulatory Takings 1062 (2d ed. 2001) 18

Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000) 7, 18

Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995) 18

Restatement (Second) of Torts, § 858 (1979) 14

INTEREST OF *AMICI CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioner.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, and historically has been, vitally concerned with judicial decisions regarding government regulation and taking of private property.

NAHB appeared before the Court as a petitioner in a case decided last month concerning the Clean Water and Endangered Species Acts, *NAHB v. Defenders of Wildlife*, No. 06-340, 551 U.S. ___, 2007 WL 1801745 (U.S. June 25, 2007). It has also participated as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by over-zealous government action under a wide array of statutes and regulatory programs.[2]

---

[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*,

In particular, NAHB has frequently asked this Court to clarify procedural and jurisdictional issues to enable the resolution of Fifth Amendment takings claims on their merits. Too often, ripeness principles and statutes of limitations are misapplied to operate as an unfair bar, denying land owners full and fair court access on constitutional takings claims. NAHB thus offers its experience in this field and a national perspective to support the Petitioners.

STATEMENT OF THE CASE

Petitioners are typical of takings claimants who have been trapped by the jurisdictional requirements that the lower courts have established in response to this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)

---

503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S.Ct. 1843 (2006); and *Rapanos v. United States*, 126 S.Ct. 2208 (2006).

(*Williamson*). Their litigation odyssey exceeds thirteen years at this point, and there is no prospect that they will ever receive a decision on the merits of their Fifth Amendment takings claim from a federal court.

Petitioners live in the Village of Sterling, Ohio, and obtain their domestic water from wells. Around 1980, the City of Rittman began operating a well field outside of its boundaries and near Petitioners' homes. *McNamara v. City of Rittman*, 473 F.3d 633, 635 (6th Cir. 2007). The operation of the well field lowered the level in Petitioners' wells and degraded the quality of their water. In 1994, Petitioners first attempted to receive some form of monetary relief by bringing a state law claim for illegal "dewatering" in state court. *Id.* If they had won, no further litigation would have ensued because they would have been compensated for the City's actions. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 691 (1999); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n. 21 (1984). However, the Ohio courts ruled the City was immune from liability. *McNamara*, 473 F.3d at 633. Thus, in state court Petitioners received no decision on the merits, and no monetary award, arising from the City's taking of the water.

Having been denied monetary relief in state court, in December 2000 Petitioners then brought a Fifth Amendment takings claim for just compensation in federal court. *Id.* at 636. The district court ruled that Petitioners' federal takings claim was out of time. It believed that the physical takings claim immediately ripened in 1994, around the time that the state suit was filed, when Petitioners knew or should have known of their injuries caused by the City's dewatering. *Id.* The district court thus dismissed the Petitioners' takings claim because it should have been filed in 1996, within the applicable two-year limitations period under Ohio law. *Id.* Moreover, the district court ruled that an initial state suit to ripen a federal claim was not necessary back in 1994, because in 1996 (while the state

dewatering suit was underway) the Sixth Circuit issued an opinion in another case,[3] deciding that Ohio's inverse condemnation procedure was inadequate to compensate aggrieved landowners for takings. *Id.*

The court of appeals dismissed Petitioners' case, through slightly different reasoning. The Sixth Circuit separated its analysis into two parts, i) past violations, and ii) continuing violations. *McNamara*, 473 F.3d at 637. With respect to past violations, the court of appeals followed the district court's reasoning and explained that in 1994 Ohio's compensation procedure was inadequate, and therefore Petitioners could have brought the past violation takings claim immediately to federal court. With respect to the continuing violation, the Sixth Circuit ruled that to ripen their takings claim, the Petitioners must again return to state court and bring a mandamus action, which the Ohio Supreme Court *did* recognize as an available procedure in yet another 1994 decision. *Id.* at 637-40. Thus, in the court of appeals' view, the 2000 federal takings suit for past violations was too late, and for continuing violations was too early.

REASONS FOR GRANTING THE WRIT

I. THE STATE LITIGATION RULE AND THE *"WILLIAMSON* TRAP."

In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 340 (2005), four concurring Justices stated this Court's decision in *Williamson*, "may have been mistaken," because "[i]t is not clear ... that *Williamson County* was correct in demanding that ... the

[3] The district court relied on *Kruse v. Vill. of Chagrin Falls*, 74 F.3d 694 (6th Cir. 1996), a case that was not decided until two years after Petitioners first filed suit in Ohio state court.

claimant must seek compensation in state court before bringing a federal takings claim in federal court." Two years have elapsed since *San Remo*, but this Court has not yet clarified *Williamson*. As a result, takings claimants, like Petitioners here, are routinely trapped in a bizarre and arbitrary web of unclear and inconsistent ripeness requirements, and are precluded from having their claims heard in federal courts.

Williamson devised two rules to ripen Fifth Amendment takings claims. First, such claims are not ripe until government "has reached a final decision regarding application of the regulations to the property ...." 473 U.S. at 186. As the Petitioners have alleged a physical taking of their water, the finality rule is not at issue here.[4]

Williamson's second ripeness requirement is at issue: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the

[4] Though this Court has never decided this issue, the courts of appeals agree that the finality requirement is not implicated when the government physically takes a person's property. See *Asociación de Subscripción Conjunto del Seguro de Responsabilidad Obligatorio v. Galarza*, 484 F.3d 1, 15 (1st Cir. 2007) ("[T]he finality prong of *Williamson County* is inapplicable to physical takings."); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 958 (7th Cir. 2004) ("[A] physical invasion constitutes a 'final decision' and thus satisfies *Williamson County*'s first requirement."); *McKenzie v. City of White Hall*, 112 F.3d 313, 316 (8th Cir. 1997) ("A physical taking is by definition a final decision for the purpose of satisfying *Williamson*'s first requirement."); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1478 (9th Cir. 1989) ("*Williamson County*'s final decision requirement is inapplicable in cases of physical invasion.").

procedure and has been denied just compensation." *Id.* at 195. Concurring in *San Remo*, the late Chief Justice Rehnquist labeled this requirement the "state-litigation rule," and described it as follows: "Until the claimant had received a final decision of compensation through *all* available state procedures, *such as* by an inverse condemnation action, he 'could not claim a violation of the Just Compensation Clause.'" 545 U.S. at 341 (citing *Williamson*, 473 U.S. at 195-196) (emphasis added). The concurrence further observed that the state-litigation rule "may have been mistaken." *Id.* at 340.

Most federal circuits have interpreted *Williamson* to mean that a Fifth Amendment takings claim is not ripe—it does not exist—until a property owner has sought and been denied compensation in state court, under state law.[5] However, after takings claimants pursue initial state litigation as *Williamson* requires, federal courts still avoid the merits of Fifth Amendment claims by dismissing them based on statute of limitations, claim preclusion, issue preclusion, *Rooker-Feldman*, abstention, or a combination of these grounds. See generally Michael Berger & Gideon Kanner, *Shell Game! You Can't get There From Here:*

[5] *Gilbert v. City of Cambridge*, 932 F.2d 51, 63-65 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 168 (3rd Cir. 2006); *Samaad v. City of Dallas*, 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368-73 (7th Cir. 2000); *Von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 379-80 (8th Cir. 1997); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *Bateman v. City of W. Bountiful*, 89 F.3d 704, 708-709 (10th Cir. 1996); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000).

Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage, 36 Urb. Law. 671 (2004).

Thus, it has become the regular practice of the lower courts to bar federal takings claims brought before state court litigation as *too early*, and federal claims brought after state litigation as *too late*. This problem is called the "*Williamson* Trap,"[6] and it has ensnared the home owners in this case.

The courts of appeals have recognized the problem that *Williamson* causes to taking claimants. For example, the Sixth Circuit, in a different case, recognized that the "interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004). Similarly, the Tenth Circuit has provided that: "It is difficult to reconcile the [compensation procedures] ripeness requirement of *Williamson*" with issue and claim preclusion. *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998). Most recently, the Seventh Circuit's attempt at reconciliation was to relegate the Fifth Amendment to the "status of a poor relation"[7] by stating that: "[I]f the property owner goes through the entire state proceeding, and loses, he cannot maintain a federal suit." *Rockstead v. City of Crystal Lake*, 486 F.3d. 963, 968 (7th Cir. 2007) (Posner, J.).

Under *Williamson*, and Sixth Circuit precedent in 1994, Petitioners had to seek compensation in state court before

[6] Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000).

[7] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

they could bring a Fifth Amendment takings claim in federal court. *Infra* pp. 9-12. Yet, after Petitioners exhausted litigation in the state court to ripen their federal taking claims, the court of appeals below invoked *Williamson* to hold their claims were *too early*, and then the statute of limitations to find that their takings claims were *too late*.

Below, Amicus describes the options that the Petitioners confronted to ripen their federal takings claim when they first initiated litigation in 1994. Furthermore, Amicus explains why none of those options would have led to adjudication in federal court, thus, catching Petitioners in the *Williamson* trap. Finally, Amicus explains the conflicts that exist between *Williamson* and this Court's other precedents.

II. BASED ON THE COURT OF APPEALS' INTERPRETATION OF *WILLIAMSON*, UNDER NO SET OF CIRCUMSTANCES COULD PETITIONERS EVER OBTAIN FEDERAL COURT ADJUDICATION OF THEIR 5TH AMENDMENT TAKINGS CLAIM.

In 1994, Petitioners wanted the City to pay them for the water it had taken. So, they filed suit in state court to recoup monetary damages on their dewatering claim. Petitioners pursued this path because this is what the compensation procedures rule of *Williamson* required; if they lost in state court, then the initial state suit would have ripened their federal takings claim for subsequent adjudication to obtain just compensation in federal court. But, the court of appeals told Petitioner they chose the wrong path — in contravention of *Williamson* and its own cases interpreting *Williamson*.

The Petitioners' odyssey illustrates the problem that *Williamson* causes for claimants who want to have their Fifth Amendment arguments decided by a federal court.

Plaintiffs must guess which route will lead them to federal court, and no matter which path they follow, the federal courts refuse to reach the merits.

A. Petitioners Could Not Have Immediately Brought Their Takings Claim to Federal Court in 1994

Petitioners' most direct path to federal court (as suggested by the court of appeals) would obviously have been to file their Fifth Amendment takings claim immediately in district court. However, the Sixth Circuit's assertion that Petitioners could have brought their past violation takings claim right to federal court in 1994 is disingenuous. At that time, the Sixth Circuit routinely dismissed takings claims as unripe under *Williamson* for failure to pursue a state takings claim through Ohio's mandamus procedure — the very procedure the Sixth Circuit now claims was inadequate at the time. As early as 1985, the Sixth Circuit dismissed a federal takings claim under *Williamson* for failure to pursue Ohio's mandamus procedure.[8]

The Sixth Circuit's claim that Ohio's mandamus procedure was inadequate in 1994 is based upon the assertion that the mandamus procedure for uncompensated takings was not adequate until the Ohio Supreme Court made it explicit in *State ex rel. Levin v. City of Sheffield Lake*, 637 N.E.2d 319 (Ohio 1994). Previously, however, the Sixth circuit found a slew of earlier decisions by Ohio's appellate courts establishing mandamus as an adequate takings procedure. *Infra* pp. 10-11. In fact, *Levin* did not

[8] *See Four Seasons Apartment v. City of Mayfield Heights*, 775 F.2d 150 (6th Cir. 1985) (dismissing takings claim under *Williamson* because there was no claim that Ohio does not have "adequate inverse condemnation law permitting citizens to recover just compensation for government takings.").

fundamentally change prior Ohio precedent, which had allowed the use of mandamus by property owners to obtain compensation in certain situations. *Levin* merely reiterated that previous decisions "have held that mandamus is the vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged." 637 N.E.2d at 323. *Levin* relied upon precedent from both the Supreme Court of Ohio and the Court of Appeals of Ohio for this assertion.[9]

In the opinion below, the Sixth Circuit stated that prior to the *Levin* decision, Ohio did not have adequate compensation procedures to ripen federal takings claims. The Sixth Circuit went so far as to explain that "*Williamson*, therefore, had little impact on takings claims brought in Ohio prior to *Levin*, as such claims were immediately ripe for review." *McNamara*, 473 F.3d at 639. This is not true. The Sixth Circuit's prior decisions show that *Williamson*, in fact, was the decisive factor in rendering federal takings claims unripe prior to *Levin*.

For example, in 1991 — at least three years before the *Levin* decision — the Sixth Circuit explained, in great detail, that Ohio had a sufficient procedure for uncompensated takings:

---

[9] *See, e.g., State ex rel. McKay v. Kauer*, 102 N.E.2d 703, 709 (Ohio 1951) (mandamus was the property remedy for a property owner to recover compensation for the taking of an easement by the state Highway department); *Wilson v. City of Cincinnati*, 175 N.E.2d 725, 727 (Ohio 1961) (property owner could have taken action to recover compensation from the state for a taking that had already occurred through a mandamus action); *State ex rel. Brown v. Preston*, 198 N.E.2d 90, 91 (Ohio Ct. App. 1963) (mandamus should be used to compel appropriation proceedings against the state where property has been taken without compensation).

> "[T]here is a procedure under Ohio law to obtain compensation for a taking. If a party can demonstrate that the enforcement of a zoning regulation results in an unconstitutional taking, a state court may issue a mandamus to state officials directing them to institute eminent domain proceedings to determine just compensation."

Duncan v. Vill. of Middlefield, 951 F.2d 348 (Table) 1991 WL 276270 at *3 (6th Cir. 1991). The court provided that because the property owner had an adequate state law remedy to address the taking of his property, his federal takings claim was not ripe under *Williamson.*

In 1992, the Sixth Circuit again explicitly recognized that Ohio had an adequate procedure for an unlawful taking. In *Silver v. Franklin Twp. Bd. of Zoning,* 966 F.2d 1031 (6th Cir. 1992), the Sixth Circuit dismissed a federal takings claim because the appellant failed to pursue a mandamus action in Ohio courts. The Sixth Circuit reiterated that:

> "Ohio law provides a procedure for obtaining just compensation for a government taking. If a property owner can demonstrate that the enforcement of a zoning regulation results in an unconstitutional taking, the owner may seek mandamus from a state court directing state officials to institute eminent domain proceedings to determine just compensation."

966 F.2d at 1035. The court relied upon the Ohio Supreme Court's explicit approval of the mandamus procedure for

this proposition.[10] In short, notwithstanding the court of appeals' protestations to the contrary, in earlier decisions pre-dating Petitioners' 1994 state court filing it repeatedly determined that Ohio's mandamus procedure was adequate, and that federal takings claims were unripe under *Williamson* when property owners failed to avail themselves of that procedure in state court.[11]

That the Sixth Circuit has issued conflicting decisions concerning when Ohio's mandamus procedure became available is not surprising given *Williamson*'s complexity and uncertainty. *Williamson*'s charge that federal courts must ascertain whether states have "reasonable, certain, and adequate" procedures has now resulted in contradictory and confusing precedent within the Sixth Circuit.

Petitioners took the most reasonable course by filing the state dewatering suit in 1994, given the Sixth Circuit's precedent at that time. The court below stated that Ohio did not have a "reasonable, certain, and adequate procedure" available for inverse condemnation in 1994 — but it obviously chose to ignore its own rulings, as of 1994, that a

[10] "[A] judicial solution to [an uncompensated taking] would result in legal compensation directed to the proper appropriating authority to compensate the landowner for such a taking." *Vill. of Willoughby Hills v. Corrigan*, 278 N.E.2d 658, 605 (Ohio 1972).

[11] *See also Ardire v. Rump*, 996 F.2d 1214 (Table) 1993 WL 239053 at *4 (6th Cir. 1993) ("Ohio law provides a procedure for obtaining compensation for a governmental taking; namely and action in mandamus under Ohio Rev. Code § 2731 to force the city to commence eminent domain proceedings."); *Harris v. City of Akron*, 20 F.3d 1396, 1405 (6th Cir. 1994) (dismissing Ohio claimant's federal takings claim under *Williamson*).

federal takings claim would be dismissed under *Williamson*. The only explanation for the court of appeals' failure to consider its own rulings was to prevent Petitioners from receiving a federal adjudication on the merits of their Fifth Amendment claim. Stuck between this rock and a hard place, the Petitioners reasonably believed that filing a takings claim immediately in federal court, would have been futile.

B. Seeking a Writ of Mandamus Was Not Reasonable Under Ohio Law In This Case.

1. Mandamus Would Not Have Issued

Considering the Sixth Circuit's interpretation of *Williamson* in 1994, at first glance it would seem that Petitioners best option for ripening their federal takings claim would have been to bring a mandamus action in state court. However, though the Sixth Circuit approved of Ohio's mandamus procedure in general, under the facts of Petitioners case, it is not likely that such a writ would have issued under Ohio law.

A mandamus in Ohio is "a writ, issued in the name of the state to an inferior tribunal, a corporation, a board, or person, commanding the performance of an action which the law specially enjoins as a duty resulting from an office, trust or station." Ohio Rev. Code § 2737.04. [12] However, Ohio law also provides that "[t]he writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law." Ohio Rev. Code §2731.05

[12] Ohio law requires public officials to bring an appropriation action prior to the taking of private property. Ohio Rev. Code § 163.01-163.62.

In addition, in 1984, the Ohio Supreme Court changed a longstanding groundwater rule and adopted the Restatement of the Law 2d, Torts, Section 858. Section 858 provides that a landowner "who withdraws groundwater" is not liable for the "interference with the use of water by another, unless the withdrawal of the groundwater unreasonably causes harm" to a neighbor "through lowering the water table or reducing artesian pressure." *Cline v. American Aggregates Corp.*, 474 N.E.2d 324, 327 (Ohio 1984) (quoting the Restatement of the Law 2d, Torts, Section 858). Subsequently, the Ohio Court of Appeals in *Cline* affirmed the trial court's award of damages totaling $54,274. *Cline v. Am. Aggregates Corp.*, 582 N.E.2d 1 (Ohio App. 1989). Further, when Petitioners brought their state case, Ohio law was clear that "mandamus [was] not ordinarily [to] be employed as a substitute for an action at law to recover money." *Maloney v. Sacks*, 181 N.E.2d 268, 269 (Ohio 1962).

Consequently, Petitioners were faced with a set of facts that mirrored those in *Cline*, and therefore they had a viable claim based on the Restatement of Torts (*i.e.*, the unreasonable dewatering claim). A tort claim, as evidenced in *Cline*, is an "action at law to recover money." *Maloney*, 181 N.E.2d at 269. Thus, because that claim was "an adequate remedy in the ordinary course of law," a writ of mandamus would not have issued in the dewatering context. Ohio Rev. Code §2731.05.

2. Mandamus Would Have Precluded Petitioners' Subsequent Fifth Amendment Takings Claim

Finally, if the Petitioners had brought a mandamus action in state court and lost, they would have presumably ripened their federal takings claim. At the same time, however, they would have been precluded, under the doctrine of collateral estoppel, from bringing their Fifth Amendment takings claim in federal court.

Ohio courts have made clear that in mandamus actions involving the taking of property, the court must determine whether the property rights of the owner were taken by the public authority. *Levin*, 637 N.E.2d at 323, *Akron-Seller Co. v. City of Akron*, 359 N.E.2d 704, 705 (Ohio App. 1974) (explaining that in a mandamus action "it is for the court . . . to determine if there was a pro tanto taking of the owner's property without compensation."). Thus, if Petitioners had brought a mandamus action to ripen their Fifth Amendment claim, they would have been forced to litigate the issue of whether their property was taken by the City. This course of action is similar to the one that blocked the *San Remo* petitioners from federal court.

In *San Remo*, the plaintiff reserved its federal takings claim while it asked the state court to decide whether the imposition of a monetary exaction constituted a taking without just compensation. The California courts held it was not. *San Remo Hotel, L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002). The property owner then proceeded to federal court. The Ninth Circuit estopped the federal action under issue preclusion, finding that the state court actually and necessarily decided the principal issues comprising the federal claim. *San Remo Hotel, L.P. v. San Francisco City and County*, 364 F.3d 1088 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005).

Subsequently, this Court was asked to decide "whether federal courts may craft an exception to the full faith and credit statute for claims brought under the Takings Clause of the Fifth Amendment." 545 U.S. at 326. *San Remo* also addressed whether a claimant could avoid issue preclusion by reserving a federal claim in state court under the authority of *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964). *San Remo*, 545 U.S. at 333-34.

The Court held it was "not free to disregard the full faith and credit statute solely to preserve the availability of a

federal forum" after initial state litigation mandated by *Williamson*. *San Remo*, 545 U.S. at 339. The Court further recognized that issue preclusion bars relitigation in federal court after a "state court actually decided an issue of fact or law that was necessary to its judgment." *Id.* at 336. "This is so even when the plaintiff would have preferred not to litigate [first] in state court, but was required to do so by statute or prudential rules." *Id.* Moreover, the Court ruled that reserving a federal claim for later federal court review was not permissible, resolving a circuit split on this point. *Id.* at 333-34.

Accordingly, in this case, if Petitioners had brought a mandamus action, Ohio law would have required them to litigate a state takings claim. If they failed to convince the state court that their property rights were taken by the City, they would have suffered the same fate as the petitioners in *San Remo*. They would have been precluded from bringing their federal takings claim in federal court.

C. Petitioners Reasonably Believed Their Damage Claim Would Ripen Their Federal Takings Claim.

In *Williamson*, the Court provided that "if a State provides an adequate procedure for seeking compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson*, 473 U.S. at 195. The Court then cited favorably the law in Tennessee that established the procedures that the *Williamson* plaintiffs needed to follow to ripen their federal takings claim. *Id.* at 197. Those procedures allowed a property owner to "petition for a jury of inquest . . . or . . . *sue for damages in the ordinary way*." Tenn. Code Ann. § 29-16-123 (1980) (emphasis added).

In view of Petitioners' other options (described above), and the Court's decision in *Williamson*, Petitioners

reasonably decided to seek compensation in state court under a tort action. First, the Ohio Supreme Court and Court of Appeals had accepted an unreasonable dewatering claim in *Cline*. Consequently, if Petitioners were successful in state court, they would have been compensated for their damages and the litigation would have ended.[13] Second, they also believed that the tort action would ripen their federal takings claim because they had sought compensation by "su[ing] for damages in the ordinary way." *Williamson*, 473 U.S. at 197.

To conclude, in 1994 the Petitioners reasonably believed Supreme Court and Sixth Circuit precedent required them to seek monetary compensation in state court to ripen their federal takings claim. After a review of Ohio law, they chose the most reasonable option; they brought an unreasonable dewatering claim in state court.

III. *WILLIAMSON* CONFLICTS WITH THIS COURT'S OTHER OPINIONS

As shown above, *Williamson* requires taking claimants to possess psychic abilities to uncover the correct path to federal court. Moreover, *Williamson* presents takings claimants with inconsistencies within this Court's jurisprudence, which they must decipher before bringing their claim.

A. Discord on Simultaneous vs. Subsequent Takings Claims.

Tension is pronounced between *San Remo* and *Williamson*. *San Remo* held that takings plaintiffs can

[13] The district court agreed that this is a "seemingly logical premise." *McNamara v. Rittman*, No 1:00-CV-3046, slip op. at 10 (D. Ohio Aug. 8, 2002).

"simultaneously" bring federal and state takings claims in state court. *San Remo*, 545 U.S. at 338. Yet *Williamson* made clear that exhaustion of state compensation procedures is a necessary first step to ripen federal takings claims: "*until* [a plaintiff] has utilized [state] procedures, its takings claim is *premature*." *Williamson*, 473 U.S. at 197 (emphasis supplied). Moreover, every court of appeals interpreting *Williamson* (*supra* note 10) has decided that that initial exhaustion of state court compensation procedures is a ripening prerequisite for federal takings claims.[14] How can *San Remo* and *Williamson* be harmonized, if at all? How can a Fifth Amendment claim be brought simultaneously with a state takings claim in state court (*San Remo*), when that federal claim is not ripe until after state litigation is exhausted and the state court denies compensation (*Williamson*)?

B. Anomaly with Removal Jurisdiction.

In *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), the Court allowed a municipal defendant to remove a federal takings claim from state to federal court, because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 163. Under the federal removal statute, a case can be removed from state to federal court only if it could have been brought in federal court

[14] Scholars agree. *See, e.g.*, Steven J. Eagle, Regulatory Takings 1062 (2d ed. 2001) ("the 'ripeness' metaphor is one that promises ultimate vindication."); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) (*Williamson*'s "language ... suggests that the state law is merely preparatory to a federal suit."); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court.").

originally. 28 U.S.C. § 1441(a). But under *Williamson*, federal courts do not have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. The Eighth Circuit believes that the ironic synergy between *College of Surgeons* and *Williamson* has created an "anomalous gap ... in Supreme Court jurisprudence." *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003). Does this Court intend a ripeness doctrine that prevents federal courts from deciding federal takings claims if they are initially filed in that forum by a plaintiff, but allows federal adjudication over such claims *only* when municipal defendants exercise their removal option to federal court?

Moreover, municipal defendants have been permitted to remove federal takings cases from state to federal court, and once in federal court, argue that the claims should be dismissed for lack of a prior state ripening suit. See, *e.g.*, *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006); *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003). Does this Court intend a ripeness regime that allows municipal defendants to whipsaw takings plaintiffs by removing them to federal court, and then bouncing them back to state court? How could that result possibly serve interests of judicial economy?

CONCLUSION

The options that the Petitioners faced in 1994 to try to have a federal court address their Fifth Amendment claims, their ultimate choice, the Sixth Circuit's ultimate decision and the conflicting Supreme Court opinions demonstrates how *Williamson* has created an unworkable process that leads to a single outcome—Plaintiffs cannot have their Fifth Amendment takings claims heard in federal court.

When this Court decided *Williamson* in 1985, modern takings jurisprudence was still in its infancy. Since then, the contours of the Fifth Amendment's substantive protections have become somewhat more defined. But the most basic, fundamental jurisdictional question—Can a federal court decide a federal takings claim?—is undeciphered.

It is no exaggeration to assert that *all* of takings law, both substantive and procedural, developed by this Court and the lower federal and state courts, hinges on clarification of the *Williamson* state-litigation rule. If this Court truly means to shield Fifth Amendment protections from federal review, respectfully, it needs to say so unequivocally. Whether federal takings claims are reviewable in federal court is a significant constitutional question, and this petition should be granted so the Court can revisit the state-litigation rule.

July 11, 2007

Respectfully submitted,

Thomas J. Ward
(Counsel of Record)
Christopher Whitcomb
Duane Desiderio
National Association of
Home Builders
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200